(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court **[2021] NZDT 1310**

APPLICANT **Ms E**

RESPONDENT **Mr T**

The Tribunal orders:

Mr T is to pay to Ms E the sum of $14,047.80 on or before 28 February 2021.

Reasons

1. On 6 October 2016, Ms E purchased a new build at [redacted], from Mr T of LM Limited ("the Company").

2. As soon as Ms E moved in, she realised that the central heating system ("the System") was not working as it should.

3. Mr T sent in a contractor many times in 2017 and 2018 to repair the System, but problems persisted. Eventually, in 2019, Ms E hired her own contractor to fix the System. She has filed a claim seeking $27,100.30, made up of repair costs of $13,012.80 and legal costs of $14,087.50.

4. Mr T defends the claim on the basis that the repair costs and legal expenses are unreasonable. He notes that the Company has been removed from the Register, but he accepts personal responsibility for reasonable repair costs, which he puts at approximately $9,000.00.

5. The issues to be resolved are: (a) Is it possible for the claim to proceed against Mr T? (b) Is Ms E entitled to claim the repair costs sought? (c) Are the legal costs recoverable?

Is it possible for the claim to proceed against Mr T?

6. Ms E is not able to seek redress from the Company, as it has been removed from the Register by Mr T.

7. However, I find that it is possible for the claim to proceed against Mr T personally. I have reached this conclusion for the following reasons:

   (a) Mr T was the sole director and shareholder of the Company. His name appeared alongside that of the company in the contract, albeit in brackets. Mr T signed the contract himself. Despite these factors, Mr T would usually still be entitled to sit behind the "corporate veil" and be shielded from this claim. This protection is one of the key purposes of a company structure.

The majority of companies in New Zealand would be closely held in this way, and to strip away the limited liability this affords would be to rewrite the legitimate basis upon which people choose to take risks. Anyone contracting with the company is able to see that their future claims would be limited to the assets of the company by the presentation of the contract, and in the ordinary course, would be taken to have adopted that risk.

(b) However, in this case, there are additional factors at play that entitle the Tribunal to look behind the corporate veil and find Mr T personally liable.

(c) The first is that this is a claim that falls within the limited jurisdiction of the Disputes Tribunal. The Tribunal is empowered by s18(6) to look beyond legal technicalities to the substantial merits and justice of the case. This does not entitle the Tribunal to strip away the limited liability of a company whenever any sum is owed. However, it does entitle the Tribunal to do where the justice of the case requires it.

(d) The second is that three factors exist in this case which make such a step appropriate. These factors are as follows:

(i) The Company was in the business of property development. Ms E is a consumer, in the sense that she has purchased the house to be her home from an entity that is in trade. Consumers often do not turn their minds to the potential for it to be hard to recover any compensation from a Company. If they did, they would often lack the negotiating power or opportunity to seek personal guarantees at the time of the deal. The law recognises imbalances between consumers and business in other areas of the law, such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993. The same underlying principles should apply as a factor to consider under the general law of contract in addressing the equities of lifting the corporate veil. This does not mean that any consumer can personally sue a director in every case. However, the fact that this was in the nature of a consumer contract is one factor to consider in assessing whether it is reasonable for Ms E to be treated as having fully adopted the risk of a contract with a limited liability company when she bought the house.

(ii) Ms E has a legitimate claim against the Company for breach of contract for the failure of the System. The failure was known from the time of settlement (December 2016). The Company has made a number of attempts over the years to remedy the defects, without success. The cost of the repair is known. The lifting of the corporate veil does therefore not create undue risk of unlimited liability.

(iii) Furthermore, Mr T had knowledge of a continuing failure of the System when he removed the Company from the Register.

(iv) In removing the company from the Register, Mr T had to confirm there were no known creditors. I do not accept there were no known creditors when Mr T removed the Company. The System was not working at that time. It is reasonable for “creditors” to include the concept of “ongoing liability”. Mr T would have known about the Company’s responsibility to get the System working.

(v) In these circumstances, it is in accordance with the substantial merits and justice of the case for Mr T to be named as a respondent in the claim. To his credit, he does not deny this, to a point. He accepts he can be personally liable for repair costs, albeit only up to $9,000.00. However, once the corporate veil is lifted, there is no cap, other than the jurisdiction of the Tribunal.

Is Ms E entitled to claim the repair costs sought?

8. I find that Ms E is entitled to claim the repair costs sought ($13,012.80) for the following reasons:

   (a) It is established that the System was not working, right from settlement date. It is common ground that the System had been incorrectly installed by a subcontractor who, as Mr T puts it, was "*not up to the job*".

   (b) The main defects involved:

      (i) The radiators switching on and heating the property when the thermostat is off;
      (ii) The radiators leaking, causing pressure in the System to unexpectedly drop and shut the System off;
      (iii) Incorrect connectors had been used, and pipes had been crimped, requiring new pipe work and valve blocks to be added inside the walls.
      (iv) Substantial loss of use of the system due to these and other problems, which affected 11 rooms in the house, over three years.

   (c) This resulted in a breach of the warranty in clause 7.2(1) of the Agreement for Sale and Purchase dated 6 October 2016 (the "Agreement"). That clause states (among other things) that the vendor warrants that at the date of settlement, systems which prove services to the property, including heating and air-conditioning systems, are in reasonable working order. The System was not in reasonable working order.

   (d) As the System is a consumer item, and the company was in trade, this was also a breach of the statutory guarantee that the System be of acceptable quality and fit for purpose, as set out in the Consumer Guarantees Act 1993 ("CGA"). Given the warranty in the contract, the statutory guarantee does not add any additional protection for Ms E, but it does clarify the available remedies (s18). Whilst there is a remedy under the contract to be paid reasonable repair costs without providing any right to rectify, it is appropriate to read into the arrangement the company's right to have an opportunity to rectify in certain circumstances.

   (e) Despite this right, I find that the opportunity to rectify did not exist in this case by the time Ms E hired her own contractors. Where a breach is "substantial", a consumer does not have to give a company an opportunity to rectify, and in any case, such a right only lasts for a reasonable time. In this case, not only was the failure of the System a substantial failure of the guarantees, more than a reasonable time elapsed during which time the company failed to fix the System. The repair attempts have included at least 27 visits to the property by Mr T, his company or a tradesperson arranged by him, multiple periods when the System is not working, remediating venting systems, replacing the thermostat, attempted repair of radiator fittings, requiring the walls to be cut into, plastering and tiling work to remediate wall damage, refitting the radiators, installing timber behind a poorly placed radiator and refilling and bleeding the system.

   (f) By the end of 2018, Ms E reasonably lost faith in the company's ability to repair the system and hired her own contractor, Q Ltd ("Q").

   (g) Q did a report on the system in February 2019 (the "Q Report"), and identified the work that needed to be redone to repair the system. This work was substantial, and involved removing all radiators, opening up walls, repairing and replacing pipework, adding new valve blocks to pipework, remediating walls, and rehanging radiators.

(h) Ms E was entitled by that stage to choose her own repairer and recover reasonable costs of repair.

(i) Having reviewed the ways in which the System failed, the Q Report and the invoices for the System repairs and associated wall repairs, I am satisfied that the total repair cost is reasonable. Mr T had an evidential onus to prove the invoices were excessive. Whilst I accept he would have been able to do the work more cheaply himself, I am satisfied that the invoices reflect the reasonable retail cost of the repairs. Mr T pointed to building work done by the plumbers at apparently high rates, carpentry work done by the painters which may have overlapped with this and high costs to commission the repaired System. However, I lacked the evidence to make a finding that these costs were excessive, and Mr T decided not to seek another hearing to bring further evidence on the matter.

(j) Ms E is therefore entitled to recover her repair costs.

Are the legal costs recoverable?

9. I find that the legal costs sought are largely not recoverable.

10. This is so for two reasons.

11. First, under the Disputes Tribunal Act 1988, costs associated with the proceedings, which include legal assistance in preparing and drafting the claim, cannot be recovered except in limited circumstances that do not apply in this case (s43). Some of the costs incurred by Ms E relate to the preparation of the proceedings.

12. Secondly, whether viewed under the general law of contract or the CGA, consequential losses must be caused by the breach, be reasonable, and be reasonably foreseeable as liable to result. It is reasonable for Ms E to consult with her lawyer when the System continued to fail. The contract for the purchase of her house contains many pages of fine print, and it is a necessary consequence of her ongoing frustration that she needed to understand her rights and be advised as to how she should proceed.

13. However, in cases involving small sums, the foreseeable and reasonable step is to file a claim in the Disputes Tribunal when negotiations fail. It is not economic to incur legal fees greater than the dispute, or even to a significant proportion of the dispute. The Disputes Tribunal results in a filing fee, but no more legal fees, and a District Court order to resolve the matter. Therefore, it is not a necessary or reasonable consequence of the failure of the System that Ms E incurred such high legal fees. I have awarded $1,035.00, which is the first legal account. This is adequate for lawyers to exchange correspondence up until the time when the negotiations failed. Beyond that, these costs are not recoverable.

14. I have had regard to Mr T's own legal costs, which he reports were considerable. There is no legal basis for Mr T to recover these. Ms E is not in breach of contract to him, and he also would have been able to file a claim in the Disputes Tribunal as soon as negotiations failed to trigger a solution without ongoing legal negotiations.

Conclusion

15. For these reasons, Mr T is to pay to Ms E the sum of $14,047.80 on or before 28 February 2021, calculated as follows:

Repair costs	$13,012.80
Legal costs	$ 1,035.00

$14,047.80

Referee:

J Robertshawe

Date: **28 January 2021**

Information for Parties

Rehearings
You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal
There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.
Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 days of the decision having been made. There is a $200 filing fee for an appeal.
You can only appeal outside of 20 days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions
If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information
Further information and contact details are available on our website: http://disputestribunal.govt.nz.